IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-842

ANDREW B. BLOOM,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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LIST OF AUTHORITIES CITED

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Andrew B. Bloom prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this case on September 13, 1976, petition for rehearing denied October 15, 1976.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported, but a copy of the slip opinion is attached hereto and marked "Appendix A." It affirmed (with two concurring judges) a judgment of conviction of Petitioner for possessing with intent to distribute and distributing heroin on three separate occasions. Petitioner was tried before a jury in the United States District Court for the Southern District of Texas, and there is no opinion of that Court.

JURISDICTION

The judgment of the United States Court of Appeals was entered on September 13, 1976 (see "Appendix C"), petition for rehearing denied on October 15, 1976 (see "Appendix B"). Jurisdiction of this Court lies under 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

1. Can the repeated—and acknowledgedly improper—admissions of testimony regarding offenses not charged in the indictment without observing the safeguards imposed by the Federal Rules of Evidence and repeated judicial decisions, be treated as "harmless error" within the contemplation of 28 U.S.C. §2111 and Rule 52(a), Fed. R. Cr. Proc.?

2. Whether the trial court's refusal to hold a hearing into Petitioner's wiretapping allegations resulted in a denial of due process under the Fourth and Fifth Amendments to the United States Constitution?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Sixth Amendment, United States Constitution:

   In all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury . . . and to be informed of the nature and cause of the accusation. . . .

2. The Fifth Amendment, United States Constitution:

   No person shall . . . be deprived of . . . liberty . . . without due process of law. . . .

3. The Fourth Amendment, United States Constitution:

   The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . .

4. Rule 404(b), Federal Rules of Evidence:

   Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

5. Rule 52(a), Federal Rules of Criminal Procedure:

   Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

6. Rule 41(f), Federal Rules of Criminal Procedure:

   Motion to Suppress. A motion to suppress evidence may be made in the court of the district of trial as provided in Rule 12.

7. 28 U.S.C. Sec. 2111:

   On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

8. Petitioner's conviction was had under 21 U.S.C. Sec. 841 (a)(1), although nothing in the case presently turns on said statute.

STATEMENT

Petitioner was indicted in the Southern District of Texas on May 24, 1972 on nine counts involving heroin sales. Multiple defendants necessitated numerous delays, a severance and a mistrial in Petitioner's case. At Petitioner's second trial, the prosecution's chief witness testified to numerous conversations he had had with Petitioner concerning the latter's longstanding business dealings with his Mexican connections and to his trafficing in other controlled substances. (See generally Appendix F). The trial court admitted some of this testimony outright, excluded other parts of this testimony or instructed the jury to disregard it, admitted still

other parts of it with limiting instructions to the jury[1], and finally, instructed the jury at the close of the evidence that they could only consider the evidence of such extraneous dealings as it tended to show Petitioner's propensity to deal in heroin.[2] In the Court below, Judge Ainsworth found no error in these evidentiary rulings. A majority of the panel, however, found some of the rulings erroneous but not sufficiently harmful to have prejudiced Petitioner's rights to a fair trial.

Prior to Petitioner's first trial, he filed a Motion for Hearing to Determine Use of Illegal Wire Tap on August 5, 1974 (See "Appendix D") and a Supplement to said motion on August 9, 1974. The District Judge denied these motions on August 8 and August 15. A mistrial was later declared in Petitioner's case.

On June 20, 1975, Petitioner again sought a hearing on the wiretapping question, armed with additional factual allegations in support thereof. A hearing was set by a different hearing judge, but the original trial judge aborted the hearing when it was scheduled, even though Petitioner had eight witnesses present for the hearing at that time. Petitioner reurgd his request for a hearing on the matter on July 25, 1975.

Petitioner filed a Motion for Continuance on August 1,

[1] In an effort to justify the admissibility of this evidence, the trial court instructed the jury at one point:

> "I am permitting this testimony to come in with the thought that it may tend to show, if you accept the testimony of this witness, a willingness of the defendant to deal in drugs generally, that it may lend support to the testimony of this witness that the defendant in fact dealt with heroin, to show that at the same time and during the same course of events, he either had or was willing to deal in these other drugs. [Appendix F, p. 41.]

[2] The instruction was as follows:

> "I told you at the time that the defendant was not charged with any offense concerning Marijuana or Cocaine. You would consider that testimony, if at all, only if it caused you to believe that such a person was more inclined to deal in heroin. If it had that effect, you may want to give it that effect, you may consider it, but only for that purpose and that alone. [Appendix F, p. 45.]

1975 in connection with the wiretapping allegations (See "Appendix E"). In said motion he included sworn allegations cumulative of his earlier pleadings to the effect that (1) Houston Police Department Officers had testified before a State Grand Jury that Petitioner had been the target of illegal wiretaps between January 1 and May 11, 1972, (2) Houston Police Department Officers worked closely with federal agents in the prosecution of Petitioner in the present case, and (3) The Government's principal witness against Petitioner in this case, Agent Oakum, received at least some illegal wiretap information from the Houston Police Department. Petitioner reurged his allegations at the close of the Government's case at the trial of this cause in August of 1975.

The Court below held that Petitioner had presented "no actual evidence which could plausibly suggest" that the fruits of illegal wiretaps had been used in the course of the Government's investigation of this case (See p. 5579 of the opinion below, attached as "Appendix A"). The fact that a scandal involving illegal police wiretapping had prompted motions such as Petitioner's in other criminal cases in Houston was cited to discount the currency of his allegations. The Fifth Circuit upheld the trial court's denial of a hearing to Petitioner on the wiretapping allegations.

Petitioner was convicted by jury verdict on August 5, 1975 on six counts of possessing with intent to deliver and of delivering heroin. He was sentenced September 9, 1975 to fifteen years, a special parole term of five years on each count, said sentences to run concurrently, and a fine of $15,000. His appeal was affirmed on September 13, 1976 by the United States Court of Appeals for the Fifth Circuit. Motion for Rehearing was denied on October 15, 1976.

REASONS FOR GRANTING THE WRIT

I. THE ERRONEOUS ADMISSION OF PREJUDICIAL EVIDENCE CAN NEVER BE HARMLESS UNDER THE FIFTH AND SIXTH AMENDMENTS.

A. The opinion below is inconsistent with long-established federal law, including that of the Fifth Circuit.

A majority of the Court below acknowledged that multiple errors occurred in the admission of the Government agent's discussions of other narcotic transactions with Petitioner. Rule 404(b), Fed. R. Evid., was violated by (a) instructions that the jury could consider evidence of such transactions to show Petitioner's propensity to deal in drugs generally, and (b) mere admission of such evidence when no need had been shown for it. The majority nevertheless found these errors to be harmless beyond a reasonable doubt and that is the question now before this Court.

Admitting evidence of prior crimes of a defendant is universally acknowledged to be error unless the inherent prejudice of such evidence is counterbalanced by its probative value in relation to an issue of fact which is in dispute and as to which other evidence, less prejudicial in character, is unavailable. This rule is a "cardinal principle of the common law," *United States v. San Martin*, 505 F.2d 918, 921 (5th Cir. 1974), and a "universal rule" of the federal courts. *2 Wright, Federal Practice and Procedure, Criminal* §410, at 123. See *United States* v. *Goodwin*, 492 F.2d 1141, 1148 (5th Cir. 1974). The Supreme Court recognized the policy basis for this rule many years ago.

> Proof of [other crimes] only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community. . . . However depraved in character, and however full of crime their past lives may have been, the defendants were entitled to be tried upon competent evidence, and only for the offense charged. [*Boyd v. United States*, 142 U.S. 450, 458 (1892).]

See also *Michelson v. United States*, 335 U.S. 469, 475-76 (1948).

In *United States v. San Martin*, supra, at 921-22, the Fifth Circuit recently summarized the law thus:

> Before one of the exceptions to the general rule may properly be invoked in order to introduce evidence of prior crimes, the trial court must be satisfied that several threshold prerequisites have been met:
>
> 1. Proof of the prior *similar* offenses must be "plain, clear and convincing;"
> 2. The offenses must not be too remote in time to the alleged crime;
> 3. The element of the prior crime for which there is a recognized exception to the general rule, such as intent, must be a material issue in the instant case;
> 4. There must be a substantial need for the probative value of the evidence provided for by the prior crimes. . . .

Yet evidence of the other alleged extraneous transactions introduced at Petitioner's trial was not "plain, clear and convincing." Nor was it shown to be relevant to any question at issue in the trial. Finally, there does not appear to have been any balancing of the need for such evidence against the Petitioner's right to be tried only for the crimes with which he was charged.

Virtually every court and commentator that has ever considered the question of admitting evidence of other crimes has remarked on "the enormous danger of prejudice to the defendant that the evidence of prior crimes creates," *United States* v. *San Martin*, *supra* at 921; and the "obvious prejudice" inherent in such testimony, *United States* v. *Lawrance*, 480 F.2d 688, 692 (5th Cir. 1973). "Such evidence may severely prejudice the defendant 'by the confusion of issues, or the likelihood that the jury may illogically assume that since the defendant has committed one offense he may well, for that reason alone, be guilty of another,'" *United States* v. *Broadway* 477 F.2d 991, 994 (5th Cir. 1973). "[A]ll jurisdictions observe the requirement that no evidence may be admitted which tends solely to prove that the accused has a 'criminal disposition.' The rationale for this absolute prohibition is that such evidence is always more prejudicial than probative." 70 *Yale L.J.* 763, 766 (1961). See also *McCormick, Evidence* §157 (1954).

This case presents an important and apparently novel question so far as this Court is concerned of the interpretation of the federal harmless error rules, 28 U.S.C. §2111, Federal Rules of Criminal Procedure, Rule 52(a). Can concededly inflammatory and prejudicial statements concerning alleged crimes with which the defendant was never charged, when made by a law enforcement officer in his testimony before a jury, be disregarded as "harmless error"? Petitioner urges that it cannot. The argument rests on a simple proposition of logic and law. "[I]f an error is inherently prejudicial, inquiry into its harmlessness would seem to be foreclosed, for an error can hardly be both prejudicial and harmless." *R. Traynor, The Riddle of Harmless Error* 64 (1970). Yet the Court of Appeals held that the error in admission of the above-described evidence was "harmless." The Court is thus left in the anomalous position of having found that the error was both "prejudicial" and "harmless" at one in the same time. This is, as the authorities cited demonstrate, an untenable position, which cannot be permitted to stand as valid federal law.

B. The standard of "harmless error" utilized by the Court below is in conflict with the controlling decisions of this Court.

The Supreme Court has never found a conceded error of this sort, one prejudicial *ex hypothesi* the opinion of the Court of Appeals majority, to be harmless. It is submitted that that Court may not lightly assume that errors of this magnitude did not weigh in the balance when the verdict was cast.

Indeed, the contrary is a necessary inference. Oakum was the Government's key witness. The very fact of the conviction persuasively suggests that the jury placed a high value on Oakum's credibility; if it had not, it is inconceivable that it would have returned a verdict of guilty. Yet, throughout Oakum's testimony, the admissible and the inadmissible were inextricably intertwined in a single mass. Under such circumstances the conclusion that the jury had not been improperly influenced by the inflammatory evidence of other alleged crimes would be, at best, tenuous speculation. This

Court, in contrast, has steadfastly insisted that the appellate court be convinced at a far higher order of probability.

In *Fahy* v. *Connecticut*, 375 U.S. 85, 86-87 (1963), the Court stressed that error is not "harmless" where "there is a reasonable possibility that [it] might have contributed to the conviction." And in *Chapman* v. *California*, 386 U.S. 18, 23-24 (1967), the Court reiterated:

> An error in admitting plainly relevant evidence[3] which possibly influenced the jury adversely to a litigant cannot under *Fahy*, be conceived of as harmless. Certainly error, constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless. . . . There is little, if any, difference between our statement in *Fahy* v. *Connecticut* about "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction" and requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. We, therefore, do no more than adhere to the meaning of our *Fahy* Case when we hold, as we now do, that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.

Petitioner submits that the Court of Appeals could not, as a matter of law, declare its belief beyond a reasonable doubt that no prejudice resulted from this error. Even in situations where the Government's case has more support than the testimony of a single witness, it may be thought that "[T]he erroneous admission of evidence of other crimes . . . carries such a high risk of prejudice as ordinarily to call for reversal." *R. Traynor, The Riddle of Harmless Error* 63 (1970).

[3] The instant case, unlike *Chapman*, concerns the admission of evidence which, far from being "plainly relevant," was neither relevant nor competent to prove any element of the heroin offenses with which the petitioner was charged. Hence, in comparison to *Chapman*, this is an *a fortiori* case.

The Instant case is therefore, the paradigm case for reversal: Agent Oakum's long testimony was extensively spiked with references to Petitioner's alleged drug dealings, and the District Court pointedly instructed the jury that they might consider this testimony about other alleged offenses, *not* for any of the legitimate matters as to which other crimes evidence may, when necessary, be allowed, but "if it caused you [the jury] to believe that such a person was more inclined to deal in heroin"—the very purpose for which, according to every court and authority which has been found on this point, such evidence is never under any circumstances admissible. This is no mere error of omission, a passive failure of the District Court to observe some punctillio of procedure: it was no less than an explicit invitation to the jury to consider evidence of the Petitioner's bad character in connection with its verdict. Such error could hardly fail to prejudice the jury. Under the "reasonable doubt" standard of harmless error—indeed, under any standard of error except an irrebuttable presumption of validity—this judgment should be reversed.

This Court has also indicated in *Kotteakos v. United States*, 328 U.S. 750, 90 L.Ed. 1557 (1946) that error in derogation of "a specific command of Congress" might not ever be harmless. Fed. R. Evid. 404(b) is such a command. This Court in *Boyd*, *supra*, discussed the absence of notice, the departure from "the rules prescribed by law for the trial of human beings," and other deprivations of due process occasioned by the trial court's admission of extraneous offenses against the defendants there. Therefore, the decision below should not be left to stand as a declaration of federal law so patently inconsistent with the purposes and provisions of the Fifth and Sixth Amendments and all other recognized authorities.

C. The holding of "harmless error" in repeated erroneous admissions of evidence of other crimes is in conflict with the decisions of other Courts of Appeals.

The most elementary notions of due process of law and the specific provisions of the Sixth Amendment have been violated by the trial court in this case. By both constitutional stand-

ards Petitioner is entitled to notice of the crimes with which he is charged. He cannot be indicted for one crime and convicted on the basis of evidence of other crimes. Yet that is exactly what was permitted to occur here. There is no doubt that the admission of the evidence of other crimes was unjustifiable. The majority of the Court of Appeals for the Fifth Circuit so held in this case. The only question is whether such prejudicial errors may be treated as "harmless." In treating the evidence of other crimes as "harmless," the court below rendered a judgment in conflict with those in other circuits.

It must be remembered that the evidence of other crimes was not proferred by the prosecution in response to the issue of defendant's credibility or character. It was simply offered by the Government's principal witness at the instance of the prosecutor in the Government's case-in-chief. It was done repeatedly and there was no saving instruction; indeed, the instruction to the jury was clearly erroneous and to the effect that evidence of these other crimes could be used by the jury to justify conviction on the charge. (See fn. 2 above)

In *United States* v. *Beno*, 324 F.2d 582 (2d Cir. 1963), cert. denied, 379 U.S. 880 (1963), the Court of Appeals for the Second Circuit reversed a judgment of conviction for the same reasons that call for reversal here: "By attempting to show that Beno was the sort of man likely to be perpetrator of crime, the prosecution denied him a fair opportunity to defend against the particular crime charged, for this sort of evidence weighs too heavily with the jury and makes impossible the dispassionate approach necessary if justice is to be achieved." *Id.* at 587.

In *Beno*, the Court went on to say: "As we have already indicated, a criminal defendant is entitled to have his guilt or innocence determined on the specific offense charged and not risk the possibility of conviction for a series of prior specific acts which collectively suggested that his career had been reprehensible. The force of these principles . . . lies at the very heart of our criminal law system and seems a vital part of our definition of due process of law. . . ." *Id.* at 589.

See also *United States v. Tomailo*, 249 F.2d 683 (2nd Cir. 1957).

Like the Second Circuit, the Court of Appeals for the District of Columbia has also indicated clearly why the evidence, adduced by the prosecution here without any shadow of excuse, could not be considered to be harmless. In *Awkard v. United States*, 352 F.2d 641, 645-46 (D.C. Cir. 1965), the Court said: "Intimations of past crimes, especially crimes similar to the crime charged, are extremely damaging to an accused. . . . Cautionary instructions copiously provided by the trial judge in this case, do not give the accused adequate protection. They cannot prevent the jury from considering prior actions in deciding whether appellant has committed the crime charged." See also *Fenwick v. United States*, 252 F.2d 124 (D.C. Cir. 1958).

And the Third Circuit has spoken in *United States v. Long*, 257 F.2d 340, 342 (1958) where Judge Hastie wrote:

> "The questioned evidence was not significantly probative of any matter in issue, yet it was bound to be prejudicial in introducing the suggestion of some additional misconduct into the case and into the minds of the jury. This conclusion of minimum probative value combined with a potential of substantial prejudice leads us to rule that it was reversible error to permit the jury to consider the questioned testimony."

The inconsistency between the rulings of these and other Circuits and that of the Fifth Circuit in this case calls for the exercise of this Court's jurisdiction to establish the proper rule that wilful, repeated adversion to other unproved criminal activity of the defendant—made as part of the Government's case-in-chief and not in response to issues raised by defendant—must be deemed reversible error, lest the Fifth and Sixth Amendments commands of trial limited to charges stated in an indictment be subverted. If the judgment below is allowed to prevail, we will have the standards of Kafka's *The Trial* substituted for those which have long been held to be an essential ingredient of the Fifth and Sixth Amendments.

II. THE DENIAL OF A HEARING ON PETITIONER'S WIRETAP ALLEGATIONS DEPRIVED HIM OF HIS FOURTH AND FIFTH AMENDMENT RIGHTS.

Just how much in the way of sworn allegations is necessary to entitle a defendant to an *Alderman v. United States*, 394 U.S. 165, 22 L.Ed 2d 176 (1969) hearing on the suppression of the fruits of illegal wiretaps? Petitioner's sworn allegations showed that he had been the victim of illegal wiretaps by state authorities and that the federal agent who was the prosecution's star witness had received at least some illegal wiretapping information from the state officials. These allegations were further documented by extensive newspaper accounts, federal and state grand jury proceedings, and convictions of several Houston police officers for illegal wiretapping activities. The allegations were practically sufficient in themselves to show a prosecution riddled with illegally obtained evidence in violation of Petitioner's Fourth Amendment rights. Yet these claims went unheard by the courts below.

Most cases upholding the denial of such hearings under Rule 41(f), Fed. Rule Crim. Proc., have done so because the facts urged in support of the hearing motions were conclusory. *United States v. Hickok*, 481 F.2d 377 (9th Cir. 1973); *United States v. Cirillo*, 499 F.2d 872 (2nd Cir. 1974), cert. denied, —— U.S.——, 95 S. Ct. 638; *United States v. Casanova*, 213 F. Supp. 654 (D.C.N.Y. 1963); *Cohen v. United States*, 378 F.2d 751 (9th Cir. 1967). The rule is most often stated in the words of *Cohen*, *supra*, that a defendant's allegations in support of his hearing motion must be sufficiently definite, specific, detailed and nonconjectural to present contested issues of fact. *United States v. Poe*, 462 F.2d 195 (5th Cir. 1972).

The best guidance on the sufficiency of wire-tap allegations to justify a suppression hearing is contained in the cases of *United States v. Villano*, 529 F.2d 1046 (10th Cir., 1976); *United States v. See*, 505 F.2d 845 (9th Cir. 1974), cert. denied, *Gordon v. United States*, —— U.S. ——, 95 S. Ct. 1428 (1975); and *In Re Horn*, 458 F.2d 468 (3rd Cir., 1972). All

these cases held the allegations in support of the suppression motions to be insufficient to justify a hearing, but the distinctions are illuminating. In *Villano*, proof that the defendant had been subjected to wiretaps in 1964 was insufficient to justify a hearing on whether different conduct in 1971 had also been scrutinized by illegal wiretaps, especially when the request for that hearing was made on the first day of trial. By contrast, the wiretaps of Appellant in this case were simultaneous with the investigation that led to the charges of which he was convicted, and counsel began seeking his hearing a year in advance of trial. And in *See*, a claim by the defendant that his attorney's phone had been tapped sometime in the preceeding five years but stating no nexus between the alleged tap and the attorney's representation of the defendant was held to be little more than a fishing expedition. Obviously the claim by Petitioner in this case is more specific. The District Court's denial of a hearing in *Horn*, was upheld even though the Government's denial of wiretaps was based on hearsay and even though the defendant alleged that her phone sounded like it was tapped. In this case, the Government's denial of any wiretapping was filed almost a year before the revelations upon which Appellant sought his hearing. Moreover, in view of other premature denials by the Government, the affidavit retained little credibility by the time Appellant presented his wiretapping allegations.[4] Furthermore, the existence of wiretaps on the Appellant's phone was an established fact, considerably less speculative than the taps on Ms. Horn's phone.

The importance of this question cannot be overstated. This Court has zealously protected the citizenry from intrusions by electronic surveillance. *Berger v. New York*, 388 U.S. 41, 18 L.Ed. 2d 1040 (1967); *Katz v. United States*, 389 U.S. 347, 19 L.Ed. 576 (1967); *Alderman v. United States, supra*; *United States v. United States District Court, E.D. Mich.*, 407 U.S. 297, 32 L.Ed.2d 783 (1972); *United States v. Giordano*, 416 U.S. 505, 40 L.Ed.2d 341 (1974). Without guidance as to what showing must be made to require judicial scrutiny of invasions of the rights of citizens, those rights are meaningless. It is therefore a fitting exercise of this Court's supervisory power to formulate and apply such standards for the guidance and protection of citizens in the federal courts, e.g. *Marshall v. United States*, 360 U.S. 310, 3 L.Ed. 2d 1250 (1959); *McNabb v. United States*, 318 U.S. 382, 87 L.Ed. 819 (1943). Certiorari would also be appropriate to provide guidance on a Federal Rule of Criminal Procedure, *Upshaw v. United States*, 335 U.S. 410, 93 L.Ed. 100 (1948), in this case, Rule 41(f). Fifth Amendment due process requires a vehicle for enforcement of this Fourth Amendment right. e.g. *Goldberg v. Kelly*, 397 U.S. 254, 25 L.Ed.2d 287 (1970); *Goss v. Lopez*, 419 U.S. 565, 42 L.Ed.2d 725 (1975).

[4] The Government originally denied the existence of *any* tape-recordings of Appellant in its July 20, 1972, answer to his Motion for Discovery (R.A. 367). Later, however, three such recordings came to light (R.A. 75, 90, 93). Throughout the course of the first trial, Government witnesses continually denied the existence of Jencks Act material which would later come to light. This was the basis for Appellant's Motion for Mistrial (R.A. 461) which was granted by the Court on August 28, 1974 (R.A. Docket Sheet).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for certiorari should be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit.

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CERTIFICATE OF SERVICE

I, a member of the bar of this Court, certify that three true and correct copies of the foregoing Petition for Writ of Certiorari were delivered by United States Mail, to the Solicitor General, Department of Justice, Washington, D.C. 20530, on this the 16 day of Dec., 1976.

FRANCIS JAMES MALONEY, JR.

UNITED STATES of America, Plaintiff-Appellee,

v.

Andrew B. BLOOM, Defendant-Appellant.

No. 75-3558.

United States Court of Appeals, Fifth Circuit.

Sept. 13, 1976.

Defendant was convicted in the United States District Court for the Southern District of Texas, Ben C. Connally, J., of possessing heroin with intent to distribute and distributing heroin. Defendant appealed. The Court of Appeals, Ainsworth, Circuit Judge, held that absent evidence plausibly suggesting that information used against defendant during the course of the investigation leading to his arrest or during his trial was the fruit of illegal wiretap activity, the district court was not required to hold an evidentiary hearing to determine whether the Government's evidence was tainted by illegal wiretap activity; and that the district court did not err in refusing to dismiss the indictment for noncompliance with the district plan for achieving prompt disposition of criminal cases.

Affirmed.

Tuttle and Clark, Circuit Judges, filed a specially concurring opinion.

1. Criminal Law –369.2(1)

Trial judge must balance probative value of evidence of crimes not charged against its possible prejudice to defendant and this balancing is left largely within sound discretion of trial court. Federal Rules of Evidence, rule 404(b), 28 U.S.C.A.

2. Criminal Law –1169.5(3)

Improper admission of evidence of crimes not charged may be cured by appropriate limiting instructions. Federal Rules of Evidence, rule 404(b), 28 U.S.C.A.

3. Criminal Law –822(1)

In analyzing impact of jury instructions, it is important that they be construed not in isolation, in a piecemeal fashion, but in context of entirety of judge's instructions in trial taken as a whole.

4. Criminal Law –394.5(1)

Absent evidence plausibly suggesting that information used against defendant during course of investigation leading to his arrest or during his trial was fruit of illegal wiretap activity, trial court properly refused to conduct evidentiary hearing to determine whether evidence was tainted by illegal wiretap activity.

5. Criminal Law –576(2, 4)

Where multiplicity of defendants in complex drug prosecution and problems of coordinating schedules of their lawyers made it difficult to set trial dates and substantial portions of delay in bringing case to trial were attributable to defendant and to congested criminal docket in Southern District of Texas, delays, which allegedly exceeded maximum time limit set for disposition of criminal cases under plan for the United States District Court for the Southern District of Texas for achieving prompt disposition of criminal cases, did not warrant dismissal of indictment. Fed. Rules Crim. Proc., rule 50(b), 18 U.S.C.A.

6. Criminal Law –369.1, 1169.11

In prosecution for possession of heroin with intent to distribute and for distribution of heroin, evidence of defendant's dealings in cocaine and marijuana and evidence of uncharged heroin dealings was inadmissible, absent substantial need for proof of intent to distribute or proof for any other purpose permitted by Federal Rules of Evidence; however, error was harmless beyond reasonable doubt. Federal Rules of Evidence, rule 404(b), 28 U.S.C.A.

7. Criminal Law –783(1), 1172.2

In prosecution for possession of heroin with intent to distribute and for distribution of heroin, jury instructions allowing jury to consider other crimes testimony if it tended to show "a willingness of the defendant to deal in drugs generally," and permitting jury to consider such testimony "only if it caused (the jury) to believe that such a person (as the defendant) was more inclined to deal in heroin," were erroneous; however, error was harmless beyond reasonable doubt. Federal Rules of Evidence, rule 404(b), 28 U.S.C.A.

Appeal from the United States District for the Southern District of Texas.

Before TUTTLE, AINSWORTH and CLARK, Circuit Judges.

AINSWORTH, Circuit Judge:

The appellant, Andrew B. Bloom, was convicted by a jury of possessing with intent to distribute and with distributing heroin on three separate occasions, in violation of 21 U.S.C. § 841(a)(1). Bloom was sentenced to fifteen years' imprisonment, to be followed by a special parole term of five years, and was fined $15,000. His appeal rests on claims (1) that several of the trial court's rulings and instructions with regard to evidentiary matters were erroneous; (2) that the court improperly refused to hold an evidentiary hearing to determine whether the Government's evidence was tainted by illegal wiretap activity; and (3) that the court erred in failing to dismiss his indictment for noncompliance with the maximum time limits established by the applicable plan promulgated under Rule 50(b) of the Federal Rules of Criminal Procedure for achieving prompt disposition of criminal cases. Finding these contentions to be without merit, we affirm the conviction.

I. The Facts

The Government's case rested principally on the testimony of Vernon Oakum, an agent of the Drug Enforcement Administration, who contacted Bloom on numerous occasions in an undercover capacity while attempting to arrange the purchase of a two-pound quantity of heroin. According to Oakum's testimony, this large transaction was never consummated, but in the course of negotiations, three deliveries of smaller quantities of heroin were made. The first "buy" occurred after Oakum was introduced by an informer named Robert Durst to William Hooker Davis,[1] who in

1. Bloom was originally charged in a multicount indictment together with Davis, his wife, Adell (Silvers) Bloom, and three other individuals, Ricardo Barrera, Ruben Garcia Vela, and Horacio Rangel. Bloom's case was ultimately severed and tried separately.

turn introduced Oakum to Bloom. Thereafter, Oakum arranged to meet the appellant at a liquor store in Houston, Texas, on January 20, 1972, where he purchased two ounces of what turned out to be low grade heroin for $1,400. Oakum subsequently complained that the heroin involved was not nearly as pure as it was represented to be, and was assured by Bloom that the quality of heroin in future dealings would be much better. Bloom and Oakum next met three weeks later at a Houston Holiday Inn, where Bloom provided Oakum with two heroin samples which were to be tested for quality, thereby effecting the second delivery. Finally, after numerous conversations and repeated delays resulting from difficulties Bloom encountered in arranging a new "connection," a meeting was arranged involving Bloom, Oakum, and a second undercover agent, H. T. Autry, at which thirty-two ounces of heroin were to be delivered. At the meeting, which occurred at Andrau Airport near Houston on March 24, 1972, Bloom claimed that he still did not have the thirty-two ounces, but gave Oakum a small representative sample, thus completing the third transaction. Subsequent phone calls attempting to work out delivery of the two-pound quantity ensued, but negotiations eventually broke off and the larger transaction never came to fruition.

No substantive evidence tending to rebut the testimony of Oakum and other government witnesses with regard to these incidents was introduced by the defense. Rather, defense efforts were aimed primarily at impugning the Government's evidence through cross-examination. In addition, Robert Durst was called in an apparent attempt to establish an entrapment defense, but this line of questioning was properly ruled irrelevant when it became apparent that a small quantity of heroin purportedly in the possession of Durst during the period of the investigation could not be linked to the transactions between Oakum and Bloom. Aside from Durst, no one was called to testify on Bloom's behalf.

II. The Evidentiary Rulings

During the direct examination of agents Oakum and Autry, each was asked to describe the particular circumstances surrounding the negotiations and transactions in which he was involved. In the course of doing so, each mentioned that the discussions involved cocaine as well as heroin. Oakum's testimony, which was more extensive because of his deeper involvement in the investigation, also revealed that Bloom was engaged in procuring and marketing marijuana and had considerable prior experience in securing Mexican heroin for prospective buyers. Since Bloom's indictment charged him only with heroin violations, his counsel objected to admission of the references to prior trafficking in heroin and to dealings in other drugs each time such matters were mentioned.

The numerous purportedly erroneous evidentiary rulings and jury instructions which ensued fall into four categories: (1) rulings which simply admitted testimony concerning illegal conduct not charged in the indictment; (2) rulings which allowed the jury to consider such evidence subject to appropriate limiting instructions; (3) incidents where such evidence was introduced, but the jury was instructed to disregard it; and finally, (4) instructions which allegedly permitted the jury to draw improper inferences concerning the defendant's

propensity to commit the crimes charged from the extrinsic evidence.

Rulings in the first category related to agent Oakum's testimony concerning discussions with Bloom after the first transaction. According to that testimony, Bloom had assured Oakum that he could supply higher grade heroin in the future, and that this would be secured from some unnamed Mexicans with whom he had been doing business for almost a year. Oakum also testified that Bloom mentioned he had received complaints from several of his customers about the quality of his heroin. Rulings and instructions in the remaining categories related to testimony from the two agents indicating that Bloom had suggested possible cocaine and marijuana dealings in the course of negotiating the heroin transactions. Typical of testimony in the second category is an exchange in which the Government was permitted to ask Oakum whether drugs other than heroin were mentioned on a specific occasion. After Oakum responded in the affirmative and recounted a conversation in which Bloom had alluded to marijuana and a new cocaine connection, the judge instructed the jury as follows:

> Mr. Oakum is telling us that the defendant made statements to him about the defendant's dealings in marijuana or cocaine. You will bear in mind the defendant is not charged with dealing in marijuana or cocaine. He is charged only with the several counts in the indictment that we read to you, which deal specifically with heroin transactions on given dates and times and places.
>
> I am permitting this testimony to come in with the thought that it may tend to show, if you accept the testimony of this witness, a willingness of the defendant to deal in drugs generally, that it may lend support to the testimony of this witness that the defendant in fact dealt with heroin, to show that at the same time and during the same course of events, he either had or was willing to deal in these other drugs. You will please not hold against him the fact that he was dealing in other drugs, if you should so fined [*sic*], he is not charged with that. It is simply admitted as tending to clear up or elucidate the specific charges that were read to you and with which he is on trial here today.

Most of the other incidents fall into the third category, in which the court sustained defense objections to the mention of other drugs and issued prompt curative instructions such as the following:

> Ladies and Gentlemen, this witness is telling us as to a conversation he had with the defendant in which Mr. Oakum tells us the defendant spoke of purchasing cocain [*sic*], marijuana, I believe, and possibly other narcotics other than heroin, and heroin is concerned with the counts in this indictment. I will ask you not to consider the admission of the testimony about dealing in other narcotics, if in fact he did make such an admission.

The fourth category relates mainly to a final instruction given by the trial judge just before the jury retired to consider its verdict:

> Counsel has asked that I instruct you again at this time essentially as I did earlier, you remember that there were some references early in the testimony to a discussion or maybe more than one discussion between the Government agent and the defendant about the possible purchase and sale of

marijuana and cocaine as well as heroin. I told you at that time that the defendant was not charged with any offense concerning marijuana or cocaine. You would consider that testimony, if at all, only if it caused you to believe that such a person was more inclined to deal in heroin. If it had that effect, if you want to give it that effect, you may consider it, but only for that purpose and that alone.

Bear in mind he is not charged with marijuana offenses. He is not charged with cocaine offenses. And the testimony as to a discussion on those two substances, the evidence thereof will only be for the very limited purpose, if any, if you give it that weight, I should say, that such a person would also be inclined to deal in heroin.

In analyzing the propriety of the trial judge's actions in each of these categories, it should be noted at the outset that the evidence admitted formed an integral and natural part of the agents' accounts of the circumstances surrounding the offenses for which Bloom was indicted. As in *United States v. Nunez*, 5 Cir., 1967, 370 F.2d 538, 539, where we affirmed a conviction for possession of a sawed-off shotgun despite admission of testimony indicating the defendant was driving a stolen automobile at the time of his arrest, the evidence of Bloom's unindicted activities "was inevitably a part of the background facts surrounding the commission of the crime [charged] . . . ." 370 F.2d at 539; see *United States v. Watkins*, 5 Cir., 1976, 537 F.2d 826; *United States v. Lewis*, 5 Cir., 1976, 531 F.2d 1258, 1259. *See also United States v. Persico*, 2 Cir., 1970, 425 F.2d 1375, 1384, *cert. denied*, 400 U.S. 869, 91 S.Ct. 102, 27 L.Ed.2d 108; *Ignacio v. People of the Territory of Guam*, 9 Cir., 1969, 413 F.2d 513, 520, *cert. denied*, 397 U.S. 943, 90 S.Ct. 959, 25 L.Ed.2d 124 (1970). The evidence in question served merely to complete the agents' accounts of their dealings with Bloom, and was not introduced primarily to establish propensity to commit the crimes charged. Arguably, then, it is not the kind of evidence to which the general rule excluding evidence of other offenses applies.

Even assuming that rule is applicable, however, we conclude that it is not inconsistent with the District Court's evidentiary rulings in this case. As currently codified in Rule 404(b) of the Federal Rules of Evidence,[2] the rule provides merely that

> [e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The Advisory Committee Note to this rule stresses that "[n]o mechanical solution is offered" to the problem of determining when the exceptions come into play, and that "[t]he determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other facts appropriate for making de-

2. The Federal Rules of Evidence became effective on July 1, 1975, approximately one month prior to Bloom's trial, which commenced on August 4, 1975.

cisions of this kind under Rule 403 [which deals with the general issue of relevance]." The legislative history of Rule 404(b) makes it clear that broad discretion in this regard is vested in the trial judge. As the House Committee Report on this provision notes,

> The second sentence of Rule 404(b) as submitted to the Congress began with the words "This subdivision does not exclude the evidence when offered". The Committee amended this language to read "It may, however, be admissible", the words used in the 1971 Advisory Committee draft, on the ground that *this formulation properly placed greater emphasis on admissibility* than did the final Court version.

(Emphasis added.) 1974 U.S.Code Cong. & Admin.News pp. 7075, 7081. Of course, as noted in the parallel Senate Committee Report,

> the use of the discretionary word "may" with respect to the admissibility of evidence of crimes, wrongs, or acts is not intended to confer any arbitrary discretion on the trial judge. Rather, it is anticipated that with respect to permissible uses for such evidence, the trial judge may exclude it only on the basis of those considerations set forth in Rule 403, i. e. prejudice, confusion or waste of time.

1974 U.S.Code Cong. & Admin.News pp. 7051, 7071.

The principle enunciated by Rule 404(b) coincides with and is further clarified by prior Fifth Circuit decisions. As stated in our cases, evidence of acts extrinsic to the crime charged is admissible under the itemized exceptions once the trial court is satisfied that certain threshold prerequisites have been met. As formulated in *United States v. San Martin*, 5 Cir., 1974, 505 F.2d 918, 921–22, these are:

1. Proof of the prior *similar* offenses must be "plain, clear and convincing;"
2. The offenses must not be too remote in time to the alleged crime;
3. The element of the prior crime for which there is a recognized exception to the general rule, such as intent, must be a material issue in the instant case;
4. There must be a substantial need for the probative value of the evidence provided for by the prior crimes.

(Emphasis in original.)

The evidence in question here is covered by a number of the exceptions specified in Rule 404(b). It relates to preparation to commit the crimes charged, *see, e. g., United States v. Leftwich*, 3 Cir., 1972, 461 F.2d 586, 589, *cert. denied*, 409 U.S. 915, 93 S.Ct. 247, 34 L.Ed.2d 178; *United States v. Persico*, 2 Cir., 1970, 425 F.2d 1375, 1384, *cert. denied*, 400 U.S. 869, 91 S.Ct. 102, 27 L.Ed.2d 108; *Ignacio v. People of the Territory of Guam*, 9 Cir., 1969, 413 F.2d 513, 519–20, *cert. denied*, 397 U.S. 943, 90 S.Ct. 959, 25 L.Ed.2d 124 (1970), to intent and knowledge, *see, e. g., United States v. Urdiales*, 5 Cir., 1976, 523 F.2d 1245, 1247; *United States v. Madrid*, 5 Cir., 1975, 510 F.2d 554, 556; *United States v. Fonseca*, 5 Cir., 1974, 490 F.2d 464, 469; *United States v. Bryant*, 5 Cir., 1974, 490 F.2d 1372, 1377; *Weiss v. United States*, 5 Cir., 1941, 122 F.2d 675, 682, *cert. denied*, 314 U.S. 687, 62 S.Ct. 300, 86 L.Ed. 550 (1942), and to predisposition, which is relevant to rebut an entrapment defense. *See, e. g., United States v. Tyson*, 1972, 152 U.S.App.D.C. 233, 470 F.2d 381, 384.

cert. denied, 410 U.S. 985, 93 S.Ct. 1512, 36 L.Ed.2d 182 (1973).

Turning to the threshold prerequisites for applying these exceptions as outlined in *San Martin*, *supra*, it is apparent the extrinsic evidence of heroin, cocaine, and marijuana dealings was "plain, clear, and convincing" related to offenses similar in nature and proximate in time to those with which Bloom was charged. Knowledge, intent, predisposition, and preparation were material issues in establishing the Government's case. And finally, the evidence was substantially needed for its probative value at least "to the extent that material prejudice to the defendant [was] outweighed." *United States v. Urdiales*, 5 Cir., 1975, 523 F.2d 1245, 1247.

[1] Having determined that these factors are present, the trial judge must balance the probative value of the evidence of extrinsic bad acts against its possible prejudice to the defendant. *United States v. Lewis*, 5 Cir., 1976, 531 F.2d 1258, 1259; *United States v. Nill*, 5 Cir., 1975, 518 F.2d 793, 802. As indicated by the discussion of the legislative history of Rule 404(b), *supra*, this balancing is left largely within the sound discretion of the lower court. *United States v. Crockett*, 5 Cir., 1975, 514 F.2d 64, 72; *United States v. Madrid*, 5 Cir., 1975, 510 F.2d 554, 556; *United States v. Cochran*, 5 Cir., 1974, 499 F.2d 380, 388, *cert. denied*, 419 U.S. 1124, 95 S.Ct. 810, 42 L.Ed.2d 825; *United States v. Rodriguez*, 5 Cir., 1973, 474 F.2d 587, 590. We find no abuse of such discretion in the present case.

Our review of the District Court's challenged evidentiary holdings persuades us that the extrinsic evidence admitted in this case differs markedly from that held to have been erroneously admitted in the cases principally relied upon by appellant. Unlike the evidence of a prior conviction of simple possession of illicit whiskey in *United States v. Miller*, 5 Cir., 1974, 500 F.2d 751, 762, it cannot be said that the extrinsic evidence in the present case has "precious little to do with the state of mind involved in [the crime charged, *i. e.*, in *Miller*] conspiracy with intent to defraud or carrying on the business of a distiller with intent to defraud." Here, Bloom's willingness to deal in a variety of controlled substances and his avowed experience in such transactions had a direct bearing on his *mens rea* with respect to distributing heroin and possessing it with intent to distribute as charged.

This case is also unlike *United States v. San Martin*, 5 Cir., 1974, 505 F.2d 918, 921–23, where the improperly introduced evidence as to prior crimes involved three convictions committed several years earlier (two as a juvenile). Here, the extrinsic evidence related to heroin and other drug transactions that were similar in nature and proximate in time to those involved in the indictment.

Finally, this is not a case such as *United States v. Goodwin*, 5 Cir., 1974, 492 F.2d 1141, 1151–55, in which there was a substantial possibility that undue prejudice may have resulted from improper admission of extrinsic evidence. Goodwin's principal defense was that he was not the John Goodwin named in an indictment for importation of 1000 pounds of marijuana issued several months prior to his arrest. Given the quantity of marijuana involved, there could be little question about intent if the identity issue was resolved against him. Nonetheless, Customs agents were allowed to testify at trial concerning their seizure of

3000 pounds of marijuana incident to his arrest, on the ground that this information was germane to the issue of intent. In light of the fact that the in-court identifications of Goodwin were shaky, and particularly in view of the limited need for the extrinsic evidence on the intent issue, there was a substantial danger that the testimony concerning the 3000-pound shipment may have impermissibly quieted reasonable doubts in the minds of the jurors about Goodwin's identity.[3] No parallel danger exists in the present case.

[2, 3] Particularly in light of the trial judge's repeated efforts to instruct the jury either not to consider extrinsic evidence at all or to consider it only for the very limited purpose of assessing Bloom's willingness—*i. e.*, his intent or predisposition to commit the crimes charged—it is important to remember that improper admission of such evidence may be cured by appropriate limiting instructions. *See, e. g., Driver v. United States*, 5 Cir., 1971, 441 F.2d 276; *McBride v. United States*, 10 Cir., 1969, 409 F.2d 1046, 1048, *cert. denied*, 396 U.S. 938, 90 S.Ct. 282, 24 L.Ed.2d 240. Appellant makes much of the fact that the final instruction to the jury on this topic, as well as one earlier instruction, suggests that the jury may consider evidence of extraneous criminal activity "only if it caused you to believe that such a person was more inclined to deal in heroin" and only if it demonstrates "a willingness of the defendant to deal in drugs generally." The thrust of appellant's argument in this regard is that these instructions improperly allowed the jury to infer guilt from the defendant's propensity to commit the crime charged. *See United States v. Arias-Diaz*, 5 Cir., 1974, 497 F.2d 165, 170; *United States v. Cisneros*, 5 Cir., 1974, 491 F.2d 1068, 1077–78; *cf. United States v. Garber*, 5 Cir., 1972, 471 F.2d 212, 217 (prosecutorial comment on other crimes). In analyzing the impact of jury instructions, however, it is important that they be construed not in isolation, in a piecemeal fashion, but in the context of the entirety of the judge's instructions in the trial taken as a whole. *Bolden v. Kansas City Southern Railway Co.*, 5 Cir., 1972, 468 F.2d 580, 581; *Troutman v. Southern Railway Co.*, 5 Cir., 1971, 441 F.2d 586, 590; *Delancey v. Motichek Towing Service, Inc.*, 5 Cir., 1970, 427 F.2d 897, 901; *Lyle v. R. N. Adams Const. Co.*, 5 Cir., 1968, 402 F.2d 323, 327; 9 C. Wright & A. Miller, Federal Practice and Procedure § 2558, at 668 (1971). Taken in context, the trial judge's instructions made it clear that any references in the testimony to extraneous criminal activity could be considered, if at all, for the limited purposes countenanced by Rule 404 (b).

3. The "identity" exception to the rule proscribing circumstantial use of character evidence was inapplicable to the *Goodwin* situation. As noted by the *Goodwin* court,

> [t]he "identity" exception has a . . . [very] limited scope; it is used either in conjunction with some other basis for admissibility or synonymously with *modus operandi*. A prior or subsequent crime or other incident is not admissible for this purpose merely because it is similar, but only if it bears such a high degree of similarity as to mark it as the handiwork of the accused. 492 F.2d at 1154. Goodwin's conduct at the time of his arrest was not so bizarre, unusual, peculiar, or unique that the similarities between his conduct at the time of his arrest could properly be used to link him to the crime charged in the indictment under the "identity" exception."

Finally, in view of the overwhelming evidence of Bloom's guilt, any error with regard to evidence of other crimes was harmless. *See United States v. Roland*, 5 Cir., 1971, 449 F.2d 1281, 1282; *Driver*, *supra*; *McBride*, *supra*; *cf. United States v. Bell*, 5 Cir., 1976, 535 F.2d 886 (prosecutorial comment on other crimes evidence was harmless error).

III. Purported Illegal Wiretap Activity

[4] Appellant's second major allegation of error concerns the District Court's refusal to conduct an evidentiary hearing to determine whether the Government's evidence was tainted by illegal wiretap activity. At the time of appellant's trial, public attention had been drawn by numerous newspaper articles to investigations which revealed a number of wiretap operations on the part of narcotics squads of the Houston Police Department. Since these squads often collaborate with federal drug enforcement officials, it has become a relatively routine strategic ploy in narcotics cases in the Houston area for defendants to attempt to raise the issue of possible wiretapping.

In the present case, Bloom had no actual evidence which could plausibly suggest that information used against him during the course of the investigation leading to his arrest or during his trial was the fruit of illegal wiretap activity. The only fact which even remotely pointed in the direction of such activity was that Oakum had taped some of his telephonic communications with Bloom. As the Government notes in its brief, however, such interception by a party to the communication is permissible under 18 U.S.C. § 2511(2). Accordingly, the District Court did not err in denying Bloom an evidentiary hearing on the highly speculative wiretap issue.

IV. Speedy Trial

[5] Finally, appellant maintains that his indictment should have been dismissed due to delays which allegedly exceeded the maximum time limits set for disposition of criminal cases under the Rule 50(b) Plan for the United States District Court for the Southern District of Texas for Achieving Prompt Disposition of Criminal Cases. Without detailing all the causes for delay in the present litigation, it suffices to note that the case was a complex one originally involving several defendants. The multiplicity of defendants and the problems of coordinating the schedules of their lawyers made it difficult to set trial dates. Substantial portions of the delay in bringing this case to trial are attributable to the defendant and to the congested criminal docket in the Southern District of Texas. In light of our recent decisions regarding Rule 50(b) Plans in the Southern District of Texas and elsewhere, *see, e. g., United States v. Atkins*, 5 Cir., 1976, 528 F.2d 1352, 1358; *United States v. Pena*, 5 Cir., 1976, 527 F.2d 1356, 1363–64; *United States v. Maizumi*, 5 Cir., 1976, 526 F.2d 848, 851; *United States v. Clendening*, 5 Cir., 1976, 526 F.2d 842, we conclude that the District Court did not err in refusing to dismiss Bloom's indictment for alleged noncompliance with the Plan.

AFFIRMED.

TUTTLE and CLARK, Circuit Judges (concurring specially):

[6, 7] We are of the opinion that the trial court erred in its rulings on the evidentiary categories described as (1), (2) and (4) in Part II of Judge Ainsworth's opinion, but that such errors were harmless beyond a reasonable doubt. In our opinion there was no substantial need for proof of intent to distribute or for proof of any other purpose permitted by the last sentence of Fed.R. Evid. 404(b) and thus the admission of such evidence over defendant's clear objection violated this court's prior decision in *United States v. San Martin*, 505 F.2d 918 (5th Cir. 1974). We are furthermore of the opinion that both the category (2), contemporaneous comment that allowed the jury to consider the other crimes testimony if it tended to show "a willingness of the defendant to deal in drugs generally," and the category (4), final instruction to consider such testimony "only if it caused [the jury] to believe that such a person [as the defendant] was more inclined to deal in heroin," violated the first sentence of Fed.R.Evid. 404(b), which provides, "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith."

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

U. S. Court of Appeals, Filed, Oct. 15, 1975,
Edward W. Wadsworth, Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 75-3558

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ANDREW B. BLOOM,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

ON PETITION FOR REHEARING

(OCTOBER 15, 1976)

Before TUTTLE, AINSWORTH and CLARK, Circuit Judges, PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:
/s/ Robert Ainsworth
United States Circuit Judge

United States Court of Appeals
For the Fifth Circuit

No. 75-3558

D. C. Docket No. CR-72-H-187

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ANDREW B. BLOOM,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

Before TUTTLE, AINSWORTH and CLARK, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel,

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

September 13, 1976

TUTTLE and CLARK, Circuit Judges, concurring specially.

Issued as Mandate: Oct. 26, 1976

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	§	
	§	
VS.	§	CR. NO. 72-H-187
	§	
ANDREW B. BLOOM, ET AL	§	

MOTION FOR HEARING TO DETERMINE
USE OF ILLEGAL WIRE TAP

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES ANDREW B. BLOOM, defendant in the above styled and numbered cause, and respectfully moves the Court conduct a hearing to determine the extent to which evidence which the Government proposes to use in support of the allegations contained in the present indictment is evidence obtained as the result of illegal wire tap. In support of this motion and as a basis therefor, the defendant would show the Court the following:

I

That the defendant has reason to believe, and does believe, that the evidence which the Government will attempt to use in support of the allegations contained in the present indictment is evidence which was obtained as the result of illegal wire tap activities on the part of investigating officers who participated in the investigation of this case.

II

That defendant's belief that illegal wire tap activities have been used to obtain evidence in the present case is based on the following:

1. That during the period of time that the investigation in connection with this case was being conducted several narcotics officers of the Houston Police Department worked hand-in-hand with the federal officers who were conducting that investigation. Recently, those officers who were working with the federal officers conducting the investigation in this case, have been indicted by a federal grand jury. In connection with the recent grand jury investigation of those Houston police officers, allegations have been made that those officers were involved in illegal wire-tap activities.

2. As a result of a recent trial in State Court, said trial ending in a mistrial, this defendant has learned that a certain agent of the federal government participated in clandestine and unlawful eavesdropping activities against this defendant.

III

Defendant respectfully requests the Court to conduct a pretrial evidentiary hearing to determine whether or not illegal wire-tap activities have been engaged in during the investigation which led to the present indictment. In connection with this request, defendant would respectfully request the Court to instruct the Government to provide the Court with a transcript of the grand jury testimony which was presented to the federal grand jury during its recent investigation of the Houston Police Narcotics division. Defendant also requests the Court to instruct the Government to turn over its entire file, or files, relating to the investigation of this case. Defendant also requests the Court to allow him to conduct an examination of those officers who participated in the investigation of this case to determine whether or not those officers are aware of the existence of illegal wire-tap activities concerning the investigation of this case. Defendant would request the Court that after the Court has made an examination

of the grand jury testimony herein referred to and after the Court has made an examination of the Government files concerning this case, that the Court inform the Defendant of any evidence or information contained therein which would in any way indicate that illegal wire-tap activities had indeed been conducted. The Defendant would also request the Court to make copies of the grand jury testimony herein referred to and copies of all Government files relating to the investigation of this case and to seal said copies and make them a part of the record in this case for review.

WHEREFORE, Defendant respectfully prays the Court to conduct a pre-trial evidentiary hearing to determine whether or not illegal wire-tap activities have been used in connection with the investigation of this case; and after conducting such hearing, defendant respectfully moves the Court to suppress for all purposes any evidence which was obtained directly, or indirectly, as the result of illegal wire-tap activities.

Respectfully submitted,
HAYNES & FULLENWEIDER
By /s/ Richard Haynes

Attorney for Defendant,
ANDREW B. BLOOM

711 Fannin, Suite 610
Houston, Texas 77002
224-4949

STATE OF TEXAS §
§
COUNTY OF HARRIS §

BEFORE ME, the undersigned authority, on this date personally appeared ANDREW B. BLOOM, and, upon his oath, did depose and say that every allegation of fact contained in the foregoing Motion for Hearing to Determine Use of Illegal Wiretap is true and correct.

/s/ Andrew B. Bloom

SUBSCRIBED AND SWORN TO on this, the 5th day of August, 1974.

/s/ Wm. H. Carter,
Deputy Clerk

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion for Hearing to Determine Use of Illegal Wiretap was delivered to MR. WITCHER McCULLOUGH, the Assistant United States Attorney representing the Government in this case, on the 5th day of August, 1974.

/s/

U. S. District Court, Southern District of Texas, Filed Aug. 1, 1975,
V. Bailey Thomas, Clerk
By Deputy: M. Prater

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	§	
	§	
VS.	§	CRIMINAL NO. 72-H-187
	§	
ANDREW B. BLOOM	§	

MOTION FOR CONTINUANCE

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES ANDREW B. BLOOM, Defendant in the above styled and numbered cause, and respectfully moves the Court to continue the current setting of this case and postpone at the trial on the merits until a later date, and in support of said Motion would show the Court the following:

I

That the Defendant has filed several Motions with the Court suggesting that illegal wiretap activities were utilized during the investigation which led to the filing of the present indictment and that much of evidence which will be presented by the government in support of the allegations in the present indictment were obtained directly or indirectly by the use of such illegal wiretap activities.

II

That as a result of recent proceedings in State Court involving this Defendant, this Defendant discovered the existance of grand jury testimony given by Carlos Avila and Antonio Zavala, before a Harris County Grand Jury to the effect

that illegal wiretap activities were utilized sometime between January 1, 1972 and May 11, 1972 in connection with investigations of the defendant, ANDREW B. BLOOM.

III

The said Carlos Avila and Antonio Zavala are currently under indictment in the United States District Court for the Southern District of Texas for, and have entered pleas of guilty to charges of illegal wiretap activities. However, although pleas of guilty have been entered by the said Carlos Avila and Antonio Zavala sentencing has not yet been pronounced. In a recent letter from the Honorable Ben C. Connally to the Defendant's attorney of record, Richard Haynes (a copy of said letter being attached to this motion as Exhibit A) the Honorable Ben C. Connally informed the Defendant's attorney of record that he had a conference with Phil Greene, the attorney of record for Carlos Avila and Antonio Zavala, and had been informed *that until sentence has been pronounced against the said Carlos Avila and Antonio Zavala* that if called to testify as witnesses concerning illegal wiretap activities the said Defendants would invoke the Fifth Amendment privilege against self-incrimination. Although Defendant ANDREW B. BLOOM does not believe that the plea of self-incrimination would be well taken in view of the fact that a plea of guilty has already been entered by the said Carlos Avila and Antonio Zavala, the tenor of the letter received from the Honorable Ben C. Connally indicates that such a plea of self-incrimination would be sustained until such time as the said Carlos Avila and Antonio Zavala had been sentenced.

Defendant would further show that subsequent to aforementioned State wiretap proceedings, several articles in local newspapers quoted Avila and Zavala as stating that Federal Agents, Parsons, Perry and Oakum, Agents involved in the investigation of this case, had requested and utilized information obtained by the Houston Police Department through illegal wiretap activities. Defendant would show the Court that Federal Agents Parsons and Oakum were the principle Federal Officers active in the investigatory activities made

the basis of the instant indictment. (A copy of said newspaper article is attached and made a part hereof as marked Exhibit B.)

IV

Defendant submits that he should not be subjected to a trial of the merits of this case until such time as the allegations of illegal wiretap activities have been fully aired in a hearing before the Court. Defendant would point out to the Court that he has on several occasions requested an Evidentiary Hearing on the issue of illegal wiretap activities and has thus far been denied the opportunity to air this matter before the Court. To require the Defendant to stand trial on the merits before he has had an opportunity through his counsel to determine, in a full Evidentiary hearing, the existance of illegal wiretap activities in connection with the investigations of his case would deny to this Defendant effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and would deny to this Defendant due process of law as guaranteed to him by the Fifth Amendment to the United States Constitution. Defendant submits that a trial on the merits of this case should be postponed until such time as the testimony of Carlos Avila and Antonio Zavala would be available to this Defendant, that is until after the said Carlos Avila and Antonio Zavala have been sentenced and no longer possess a valid claim of self-incrimination in connection with illegal wiretap activities.

WHEREFORE, Defendant, ANDREW B. BLOOM respectfully prays that this Motion for Continuance be granted and that the current August 4, 1975 trial setting be postponed.

Respectfully submitted,
By /s/ Richard Haynes

Attorney for Defendant
ANDREW B. BLOOM

711 Fannin, Suite 610
Houston, Texas 77002
224-4949

STATE OF TEXAS §
§
COUNTY OF HARRIS §

BEFORE ME, the undersigned authority, on this the 31 day of July, 1975, personally appeared Andrew B. Bloom, who upon oath, did, depose and say that every allegation of fact contained in the foregoing Motion for Continuance is true and correct.

/s/ Andrew B. Bloom

SUBSCRIBED AND SWORN TO on this the 31 day of July, 1975.

/s/
Notary Public in and for
Harris County, TEXAS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Defendant's Motion for Continuance was delivered to Hon. F. Bennett, A.U.S.A. attorney for the government in this case, on this the August 1, 1975.

/s/ Richard Haynes

APPENDIX F

Exerpts From Record Regarding

Extraneous Offenses

During the trial the United States Attorney developed a considerable amount of testimony from Agent Oakum regarding extraneous offenses. Oakum testified in the presence of the jury about a conversation he had had with Defendant Bloom on February 2, 1972, at a Holiday Inn in Houston.

Q (By Mr. Bennett): What, if anything, was said in that conversation, sir?

A (By Oakum): Again, I complained about the quality of heroin which he had sold me previously. And he stated that the only explanation he could offer was that possibly Mr. Davis had done something to it. I questioned his ability to provide quality heroin to me, and he assured me that he would have no problem providing quality heroin, and I told him I would be unable to do anything until he provided me with a sample of quality heroin which he said he would provide me with. He told me that the heroin was obtained from some Mexicans whom he did not identify, *and that he had been doing business with them for almost a year*, and they did not seem to trust him.

Mr. Haynes: If the Court please, we would like to, we would object to so much of the recitation about this witness as relates to the alleged conversations with Mr. Bloom that he had been doing business for one year, and suggest that it offends the—strike that. We object to it on the grounds that it is an effort to introduce into the law suit evidence extraneous to the matters contained in the indictment herein and therefore prejudicial and we ask for an appropriate instruction from the Court to disregard the same.

The Court: I believe that it would be admissible. Counsel, I would overrule your objection. A statement by the Defendant himself.

Q: Mr. Oakum, I believe you were testifying that he discussed a Mexican individual. What, if anything, did he relate in that conversation concerning this?

A: You are referring to the previous question?

Q: Yes, sir.

A: The fact that he had been doing business with these Mexicans and that he usually did his business on the telephone with them, and that he had, I guess you would call it, a code set up with them on the telephone. And he used this code of his in ordering what he wanted. *Cocaine or heroin or marijuana from them.*

Mr. Haynes: If the Court please, we reurge our objection.

The Court: I will sustain the objection to the other narcotics.

Ladies and Gentlemen, this witness is telling us as to a conversation he had with the defendant in which Mr. Oakum tells us the defendant spoke of purchasing cocaine, marijuana, I believe, and possibly other narcotics other than heroin, and heroin is concerned with the counts in this indictment. I will ask you not to consider the admission of the testimony about dealing in other narcotics, if in fact he did make such an admission. You may go forward. (R.A. 66-68).

Later Oakum testified regarding a conversation he had had with Defendant on February 25, 1972, at the same Holiday Inn.

Q (By Mr. Bennett): What was the substance of that conversation?

A (By Oakum): *He discussed the fact that he had received several complaints, I believe, from his customers about the quality of his heroin.*

Mr. Haynes: If the Court please, we object to any alleged declarations by the defendant that relates to any extraneous event not encompassed by the indictment.

The Court: I believe he can testify to that, I'll overrule your objection. (R.A. 79).

While Oakum was testifying regarding the conversation of the 25th the following colloquy between the Court, the United States Attorney and counsel for Defendant occurred.

Mr. Bennett: If it please the Court, may we approach the Bench for a second, Your Honor?
(At the Bench)

Mr. Bennett: In this conversation, Your Honor, the witness can also testify about the conversations with this defendant about other drugs in which the defendant asked this particular if he could take other drugs or get someone else to take other drugs. I wanted to go into that but I wanted to bring it to the attention of the Court. There would be other conversations where they discuss other drugs, as a matter of fact, this witness brought in another undercover agent to talk about purchasing other drugs. This is while they were talking about the purchase of heroin. I wanted to advise the Court that we want to get into this at this time and there would be some further conversations about other drugs and negotiations in this and it is the Government's position that it is a furtherance of the conspiracy and that they were intertwined.

Mr. Haynes: It would be our position to permit all of the testimony about extraneous offenses tantamount to trying the defendant as a criminal, generally. He is not indicted in this case for possession or intent to do anything with any other narcotics, and all this alleged conversation does is prejudice the right of this defendant to be tried on the accusation that he possessed heroin with the intent to distribute it.

The Court: Well, that is true, but as I reflect on it, I think perhaps the statement that he made about other narcotics to this Agent would tend to show a willingness to deal, knowledge of the dealing and so forth.

Mr. Haynes: Our position, Your Honor, is that the probative effect is outweighed by the inherent prejudice

in permitting a development of this before the jury, that is the defendant.

The Court: If you are asking for a special instruction that they will consider it only for a limited purpose, let me have it and I will give it to them later, or at least I'll consider it.

Mr. Haynes: It is our position that it is inadmissible. If the Court rules that it is, then, of course, we would as an alternative to the objection of inadmissibility, request that the Court limit its consideration by the jury so that we will try to do the best we can to—

The Court: Are you willing to stand by what you have said now?

Mr. Haynes: I will write it out during the lunch hour, if the Court permits. (R.A. 80-82).

Oakum then resumed his testimony regarding the conversation of February 25, 1972.

Q (By Mr. Bennett): Agent Oakum, in regard to this conversation that you have been testifying about, can you state whether or not there was mention of any other drugs?

A (By Oakum): Yes, sir, there was.

Q: What was that conversation, sir?

A: *The conversation was, one had to do with marijuana, the fact that when Mr. Bloom had told me about the Mexican connections having an inability or indifference to doing business with him and he said possibly it might be due to a load of marijuana being intercepted. He told me that a portion of that marijuana was destined for him, that was intercepted. Also, it seems to me that he said something about he developed a new cocaine connection.*

Mr. Haynes: If the Court please, the preface by the witness that it seems to him, indicates to me that it is in

the area of perhaps speculation, and we object to it on that further grounds. The witness is speculating as to the nature of the conversation and we certainly object to it.

The Court: Give us your very best recollection and if you don't recall, tell us so. Don't speculate. Wait just a minute.

Counsel and I have discussed previously the testimony that the witness is now giving, Ladies and Gentlemen, with respect to other narcotic drugs.

Mr. Oakum is telling us that the defendant made statements to him about the defendant's dealings in marijuana or cocaine. You will bear in mind the defendant is not charged with dealing in marijuana or cocaine. He is charged only with the several counts in the indictment that we read to you, which deal specifically with heroin transactions on given dates and times and places.

I am permitting this testimony to come in with the thought that it may tend to show, if you accept the testimony of this witness, a willingness of the defendant to deal in drugs generally, that it may lend support to the testimony of this witness that the defendant in fact dealt with heroin, to show that at the same time and during the same course of events, he either had or was willing to deal in these other drugs. You will please not hold against him the fact that he was dealing in other drugs, if you should so fine (sic), he is not charged with that. It is simply admitted as tending to clear up or elucidate the specific charges that were read to you and with which he is on trial here today.

Now, you may go forward.

Q: Agent Oakum, will you state to the best of your recollection whether or not there was any discussion, I believe you mentioned marijuana, was there any discussion to the best of your memory about any other drug?

A: Yes, sir.

Q: And to the best of our memory, what was that?

A: *The discussion concerned cocaine, and Mr. Bloom had mentioned something about his source for cocaine. And I believe he stated also that he seldom cuts cocaine, or steps on it or adulterates it. I don't recall the exact terminology being used.*

Q: Was there any further discussions on that day, at this meeting?

A: I believe that is basically what happened at that meeting. (R.A. 82-85).

Thereafter, Oakum testified regarding a conversation he had had with Defendant on March 1, 1972, at the same Holiday Inn.

Q (By Mr. Bennett): Will you state what the substance of that conversation was, please?

A (By Oakum): He advised me that he had not received pure samples of heroin which he had talked about in our previous meeting. And that he had made a trip to meet with his sources, but he had not been able to obtain the pure heroin, but he had just obtained some heroin that he had before and some marijuana. *And he asked me if I could locate some marijuana customers for him, and I tried to let him know that I was not interested in the marijuana.*

Mr. Haynes: Excuse me, may we have our objection understood to run to all of the conversations that allegedly took place that led to extraneous offenses?

The Court: Let's not go into the marijuana and the cocaine that was mentioned earlier. Such a discussion is, our witness has now described would not, in my judgment tend, as I indicated earlier, it might, to show a willingness to deal in narcotics. And, don't misunderstand me, I am not telling you to testify fully and truthfully, let's just ask about the heroin conspiracy unless there is some reason to believe that references to any

other narcotics actually tend to prove some relevant point in our indictment, please, sir. (R.A. 87).

Oakum testified regarding a meeting between he, Agent Autry and Defendant on March 23, 1972, at Andrau Airport in Houston.

Q (By Mr. Bennett): What was the substance of that conversation, sir?

A (By Oakum): Upon Mr. Bloom's arrival, we sat down and after introducing him to Mr. Autry, Mr. Bloom advised me that he did not actually have the 32 ounces as he had told me on the phone, but expected to get it that day. Also—

Q: Was there, excuse me.

A: *—Also, he had directed part of the conversation to Mr. Autry concerning the purchase of marijuana.*

Q: Okay.

Mr. Haynes: If the Court please, we would object to the answer.

The Court: Yes, don't consider that reference to marijuana, Ladies and Gentlemen. I think that really doesn't throw any light on the heroin charges against this defendant. (R.A. 96-97).

The Government also developed testimony from the witness H. T. Autry regarding extraneous offenses. Autry testified regarding the meeting between, Agent Oakum and Defendant at the Andrau Airport in March, 1972.

Q (By Mr. Bennett): What was the substance of that conversation, if you will, please?

A (By Autry): *We were negotiating for the purchase of some heroin and cocaine.*

Q: Did you take part in the conversation?

A: Yes, sir.

Mr. Haynes: We will object to so much of the response that pertains to extraneous offenses and ask the Court for appropriate response.

The Court: Yes, don't consider the reference to cocaine and marijuana, Ladies and Gentlemen. I will ask the witness to restrict your answers to what was said and done in the alleged heroin transaction, please.

Mr. Haynes: In view of the extremely prejudi[illegible] aspect of the way that the witness has responded, I am persuaded that even the most appropriate instructions the Court gives, I respectfully move the Court to declare a mistrial.

The Court: For what? I don't believe I understand you, sir. The prejudicial way in which the witness responded?

Mr. Haynes: The manner in which he testified is so prejudicial—

The Court: The reference to the cocaine and marijuana?

Mr. Haynes: I think it is just incapable of being corrected by the Court.

The Court: The motion will be denied. I asked the jury not to consider the reference to the marijuana and cocaine. Let's go forward. (R.A. 161-163).

After the close of the evidence, the Court dismissed the conspiracy count on the grounds of insufficient evidence without objection from the United States Attorney. (R.A. 249-250; 256). After closing arguments of counsel and the Court's charge to the jury, counsel for Defendant, in response to the Court's invitation, made the following request.

> Mr. Haynes: And request the Court to give appropriate instructions to the jury to disregard so much of the testimony that they received that related to the alleged extraneous offenses that the Court permitted in initially

> to assist the jury, if it did, in determining the predisposition of the defendant to engage in traffic in narcotics, and to properly limit the consideration of the jury of the extraneous matters that were permitted into evidence. (R.A. 267).

In response to the request the Court recalled the jury and gave the following instruction:

> The Court: Only one brief matter, Ladies and Gentlemen. Counsel has asked that I instruct you again at this time essentially as I did earlier, you remember that there were some references early in the testimony to a discussion or maybe more than one discussion between the Government agent and the defendant about the possible purchase and sale of marijuana and cocaine as well as heroin. I told you at that time that the defendant was not charged with any offense concerning marijuana or cocaine. You would consider the testimony, if at all, only if it caused you to believe that such a person was more inclined to deal in heroin. If it had that effect, if you want to give it that effect, you may consider it, but only for that purpose and that alone.
>
> Bear in mind he is not charged with marijuana offenses. He is not charged with cocaine offenses. And the testimony as to a discussion on those two substances, the evidence thereof will only be for the very limited purpose, if any, if you give it that weight, I should say that such a person would also be inclined to deal in heroin. (R.A. 270-271).